Supreme Court, U.S.
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No. 89-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR LISTER,

Petitioner,

v.

H. ALLAN STARK, JAMES NUGENT,
SUN ELECTRIC CORPORATION
and SUN ELECTRIC PENSION TRUST,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.1 LISTING

Sun Electric Corporation has no parents. Its only subsidiary that is not wholly-owned is Vehicle Test Technology, Inc., of which Sun Electric Corporation owns 50%.

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The Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Seventh Circuit's opinion in this case.

ADDITIONAL STATUTES INVOLVED

ERISA § 3(7), 29 U.S.C. § 1002(7), provides that:

> The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may

> become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), provides that:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> * * *
>
> (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

STATEMENT OF THE CASE

Arthur Lister ("Lister") sued the Sun Electric Corporation ("Sun"), the Sun Electric Corporation Pension Trust ("Trust"), and two trustees of the Trust in state court for fraud and breach of contract, claiming that his pension benefits under the Sun Electric Corporation Pension Plan (the "Plan") were incorrectly calculated.

Lister's action was based on his allegation that employees of Sun, the "agent authorized to administer the Plan", had orally represented to him during a break in his Sun employment that he would receive certain service credits unavailable under the written terms of the Plan. Lister prayed in his Complaint for a declaration that he is entitled to

> uninterrupted service credit for the period from July, 1964 to January, 1971 for the purpose of calculating his pension benefits. (Pet., App. 15)

Defendants removed the action to the United States District Court for the Northern District of Illinois, and moved for dismissal because ERISA preempted Lister's state law claims for increased pension benefits and because ERISA provided Lister no cause of action for pension benefits based upon oral representations. Lister then moved for remand of the action to the state court. The District Court denied the motion for remand, dismissed the complaint with prejudice, and entered judgment against Lister.

The United States Court of Appeals for the Seventh Circuit affirmed the District Court's judgment, holding that (1) removal was proper because Lister's claims for increased pension benefits were completely preempted by ERISA, since they could have been brought under ERISA's civil enforcement provisions, and (2) Lister's case was properly dismissed with prejudice because his state law claims were preempted by ERISA and because "ERISA does not recognize the validity of an oral modification of a pension plan." (Pet., App. 6 - App. 8, App. 9)

SUMMARY OF ARGUMENT

The question Lister wishes to present was not raised or decided in the proceedings below, and the record does not contain the necessary predicate for determining that question. Even if that question were properly raised, there is no conflict in the Courts of Appeals that requires resolution by this Court.

REASONS FOR DENYING THE WRIT

A. PETITIONER'S QUESTION WAS NOT RAISED OR DECIDED BELOW AND THE RECORD DOES NOT CONTAIN THE PREDICATE FOR DETERMINATION OF THE QUESTION.

The sole Question Presented in the petition (p. i) is whether Lister's state law claim for "uninterrupted service credit" should escape preemption because of the supposed fact that he was not a "member" of the Plan at the time of the alleged oral representations.

Lister did not present this question to the District Court or the Court of Appeals, and the record does not provide the predicate for determination of that question by this Court.

(1) Lister presented the following question to the Seventh Circuit:

> Whether the lower court erred in granting defendants' Motion to Dismiss and denying plaintiff's Motion to Remand on the ground that plaintiff's claims are pre-empted by ERISA, even though: (1) plaintiff's claims do not have any impact on the construction or operation of the Sun Electric Pension Plan and (2) plaintiff may have no remedy under ERISA. (Plaintiff's Brief to the Seventh Circuit Court of Appeals, p. iv.)

Lister never argued below that his state-law claim was not preempted because of his status when the alleged representations were made. He merely argued that the claims were not preempted because the oral statements had been made by Sun representatives supposedly acting in their corporate rather than in their Plan capacities. Lister focused the Court of Appeals on the capacity of the persons who made the statements rather than on his

status at the time the statements allegedly were made. Hence, the Seventh Circuit did not decide the Question Presented here. Consequently, that Question cannot be raised here. *Delta Air Lines, Inc. v. August*, 405 U.S. 346, 362 (1981); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

(2) Lister's factual allegations, moreover, do not permit the formulation or the resolution of the Question Presented. Lister did not assert, either in his complaint or in any of the memoranda filed in the District Court, that he was not a Plan participant at the time of the alleged oral representations, the necessary predicate for determining the Question Presented.[1] He asserted only that he was then a former employee of Sun. Yet, a former employee may well be a plan participant. ERISA § 3(7), 29 U.S.C. § 1002(7). *See Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 958 (1989).

The lower courts did not decide, or even assume, that Lister was not a participant in the Plan when the alleged misrepresentations were made. Thus, any review by this Court would have to be accomplished without the benefit of lower court consideration of that predicate question.

This Court should not hear a question that has not been considered below, particularly, where, as here, that question necessarily involves a predicate mixed question of fact and law—whether Lister was a plan participant when the alleged representations were made—that also has not been considered below.

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[1] In his appellate brief, Lister passingly mentioned, without record citation, that he was not a participant in the Plan at the time of the alleged oral representations. However, he never raised this as a ground for the Court of Appeals to allow him to proceed with his state law claims.

B. THERE IS NO CONFLICT AMONG THE CIRCUITS REQUIRING RESOLUTION BY THIS COURT.

Of the three allegedly conflicting Court of Appeals decisions Lister presents in the petition (p. 5), only one was decided after this Court's controlling decision in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). In that case, *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3528 (U.S. 1990), the plaintiff was not, like Lister, seeking "plan benefits or an increase in plan benefits". 872 F.2d at 162. Rather, plaintiff sought to rescind his participation in the plan and to recoup payments made to the plan on his behalf. The Sixth Circuit found such remedies unavailable under ERISA's enforcement provisions and thus held ERISA did not preempt plaintiff's claim. *Perry* does not conflict with the Seventh Circuit's decision. Unlike the plaintiff in *Perry*, Lister seeks increased pension benefits for which ERISA § 502(a)(1)(B) provides a remedy. Such a claim is clearly preempted under *Metropolitan Life*. (Pet. at App. 4 - App. 5)

The two Ninth Circuit cases that Lister claims create a conflict, while decided before *Metropolitan Life*, are consistent with both *Metropolitan Life* and the Seventh Circuit's decision here. The claims found not preempted in *Scott v. Gulf Oil Co.*, 754 F.2d 1499 (9th Cir. 1985), were based upon the plaintiffs' allegation that their ex-employer prevented their new employer from establishing an ERISA plan. The plaintiffs did not and could not seek benefits from the new employer's non-existent plan, and, thus, the Ninth Circuit held ERISA inapplicable.[2] *Freeman v.*

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[2] The Ninth Circuit, however, found tort claims, like Lister's, for increased benefits under the ex-employer's plan to be preempted by ERISA. 754 F.2d at 1505-06.

Jacques Orthopedic & Joint Implant Surgery Medical Group, 721 F.2d 654 (9th Cir. 1983), was brought by an employee who sought to void his waiver of participation in an ERISA plan. Unlike Lister, Freeman never was a participant in the plan in question, and thus had no claim for benefits under the plan. The Ninth Circuit held that ERISA did not provide Freeman a procedural remedy and thus no federal claim was stated.

This is a simple case for increased pension benefits that can be brought under ERISA's civil enforcement provisions. It is controlled by *Metropolitan Life*. There is no conflict between this case and any other Court of Appeals case, notwithstanding petitioner's attempt to formulate a new question for the first time before this Court.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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